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In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Institute for Justice is a non-profit, public interest law center committed to defending and strengthening three essential components of a free society: private property rights, economic liberty, and the free exchange of ideas.

Recently, civil forfeiture laws have been used aggressively at both the federal and state level. These laws grant governments vast authority and discretion to deprive individuals of private property. While recognizing the

important governmental interest in curbing violence and crime, it is imperative that the use of civil forfeiture laws comport with due process and the constitutional rights of private property owners.

Toward that end, the Institute files this brief in support of the respondent faced with the seizure and forfeiture of his home. The question directly before the Court and addressed in this brief is whether the government must comply with minimal due process guarantees under the Fifth Amendment by affording notice and an opportunity to be heard before depriving someone of his home.[1]

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises out of the seizure and attempted forfeiture of James Daniel Good's home and other real property by law enforcement agencies of the United States and the State of Hawaii. In January 1985, state officials searched the real property of Mr. Good and discovered 89 pounds of marijuana along with drug paraphernalia. In June and July 1985, Good was charged and

[1] This brief does not address the second question presented in this case: whether the forfeiture of real property is untimely and thus barred under 21 U.S.C. § 881(a)(7) due to the four-and-a-half-year delay between the search of the home and filing of a forfeiture action.

pleaded guilty to "promoting a harmful drug" under state law. He was sentenced to one year in jail. By August 1989, he had served his sentence and was performing satisfactorily on all terms of his probation.

However, on August 8, 1989, over four-and-a-half years after the initial search, the United States filed a forfeiture action against Good's property. At the time of the seizure of the property, it was being temporarily leased by Good to tenants. The government allowed the tenants to remain, but all subsequent rent payments were made to the government.

The United States did not provide notice or an opportunity for a hearing to anyone with an interest in the property before seizing it. Since the seizure and filing of the forfeiture action, the government has never offered any explanation for its delay in seizing the property and has refused all requests for discovery.

The district court upheld the forfeiture, but the United States Court of Appeals for the Ninth Circuit reversed and remanded, holding that federal civil forfeiture statutes require the government to act "promptly" and that the current record was inadequate to determine if the government had done so in this case. The Ninth Circuit also held that the Due Process Clause of the Fifth Amendment requires the government to give property owners notice and an opportunity for a hearing before seizing a home, unless emergency circumstances exist.

SUMMARY OF ARGUMENT

Civil forfeiture is one of the most powerful weapons in the government's anti-crime arsenal. To seize and forfeit private property, the government need only show probable cause that the property was involved in illegal activity. It does not matter whether the owner of the property is ever charged with a crime or even involved in any wrongdoing. Once probable cause is shown that the property was involved in a criminal act, the burden of proof shifts to the owner to demonstrate that the property was not involved in illegal activity.

In light of the vast powers granted to the federal government under civil forfeiture statutes, courts should insure that the application of these laws does not violate constitutional rights. When the federal government deprives an individual of life, liberty, or property, the Fifth Amendment requires, at minimum, notice and a hearing for the affected individuals. Nineteen years ago, this Court carved out an exception to due process for the seizure and forfeiture of a yacht in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Notice and hearing were not required in that instance because of (1) important governmental interests in immediate seizure; (2) the fact that yachts and other personal property could be easily concealed or moved; and (3) the forfeiture was initiated by non-self-interested "public" officials.

We urge this Court to reconsider or limit the exception to due process requirements created in *Calero-Toledo*. The factual premises in *Calero-Toledo* relate to personal but not real property, and hence should not extend to the

circumstances of other cases like this one. More significantly, *Calero-Toledo*'s presumption that the forfeiture power is wielded by non-self-interested public officials is simply false, and therefore provides an inadequate basis on which to deprive individuals of precious due process rights.

Furthermore, the right to private property in general, and the right to peaceful enjoyment of one's home in particular, are deeply rooted in our heritage and explicitly protected by several provisions of the Constitution. In routine seizures and forfeitures of real property, the government has not demonstrated an "extraordinary" circumstance needed to bypass essential due process guarantees. Also, the government's assertion that adequate protections for property owners are found in Fourth Amendment guarantees and Justice Department policy are also unpersuasive in the context of real property forfeiture. Only the Fifth Amendment's requirement of notice and hearing will provide firm protection against arbitrary and mistaken seizures of real property.

ARGUMENT

The Fifth Amendment to the United States Constitution guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " It serves equally as an affirmative restraint on the legislative, executive, and judicial powers of government. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855). Historically, the Amendment "embodies the Lockean belief that liberty and the right to

possess property are an interwoven whole; neither life, liberty, or property can be arbitrarily denied us by government." *United States v. $12,390.00*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting); *see also* L. Levy, *Original Intent and the Framers' Constitution* 276-77 (1988).

Before the government deprives an individual of property, the Due Process Clause requires, barring an "extraordinary" situation, "that there shall be notice and opportunity for hearing between the parties." *Twining v. New Jersey*, 211 U.S. 78, 110 (1908); *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"). However, since amendment of the civil forfeiture statutes in 1984, the United States can currently deprive individuals of homes and other real property without giving notice or a hearing to the affected property owners. *See* 21 U.S.C. § 881(a)(7); *but see United States v. Property at 4492 South Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989) and *United States v. A Parcel of Land, Bldgs., Appurtances, and Improvements Known as 92 Buena Vista Ave.*, 937 F.2d 98 (3d Cir. 1991) (*aff'd on other grounds*, 113 S.Ct. 1126 (1993)) (due process requires notice and hearing before seizure of real property); *see also Richmond Tenants Org. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992) (due process requires notice and hearing before eviction of public housing tenants, unless emergency circumstances exist).

In the instant case, the government premises its argument against complying with the normal requirements of due process on this Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In *Calero-Toledo*, an exception to the Due Process Clause was carved

out for the seizure of a yacht for forfeiture because (1) the seizure served significant governmental interests; (2) preseizure notice and a hearing could frustrate those interests by allowing an owner to conceal or destroy property if advance warning were given; and (3) unlike in *Fuentes v. Shevin*, 407 U.S. 67 (1972), the seizure was initiated not by self-interested private parties, but by government officials. *Calero-Toledo* at 679. Therefore, the seizure and forfeiture presented an "extraordinary" situation "in which postponement of notice and hearing . . . did not deny due process." *Id.* at 680.

I. THE NOTION THAT GOVERNMENT ACTIONS ARE CARRIED OUT BY NON-SELF-INTERESTED PUBLIC OFFICIALS IS FALSE ESPECIALLY IN CIVIL FORFEITURE WHERE GOVERNMENT OFFICIALS AND THEIR AGENCIES HAVE A DIRECT FINANCIAL STAKE IN SUCCESSFUL FORFEITURES

A deep distrust of consolidated government power and an abiding determination to protect individual rights from government overreaching animates our Constitution. Nevertheless, this Court's reasoning in *Calero-Toledo* was grounded in skepticism toward the private sphere of conduct, rather than government action. A justification for the "extraordinary" situation described in *Calero-Toledo* was that the seizure was initiated not by "self-interested private parties, but by government officials." *Id.* at 679. Conversely, just two years before *Calero-Toledo*, this Court held that a private party, before repossessing goods sold under a conditional sales contract, must give notice and the opportunity for a hearing to a debtor who

defaults on payments. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Hence the anomaly that despite the Fifth Amendment's applicability to government action, under current precedent, an individual facing repossession of property by the rightful private owner of that property is accorded greater due process protection than an individual whose property is seized through forfeiture by the government.

Perhaps no other law casts greater doubt on the *Calero-Toledo* premise that government officials do not act in their own self-interest than federal civil forfeiture law. Indeed, individuals operating in the public sphere are very similar to the "self-interested" private parties described by this Court in *Fuentes*; whether in the public or private sectors, individuals tend to promote their self-interest in any given instance. *See* J. Buchanan & G. Tullock, *The Calculus of Consent* (1962) (seminal treatment of the implications of the self-interest axiom for public policy decision-making). A key distinction, however, is that in the private, voluntary sphere, self-interested transactions usually generate mutually beneficial outcomes since they are consensual. Conversely, the coercive nature of government action requires constraints to be placed on self-interest through clearly defined and strictly enforced constitutional rules. The Framers of the Constitution recognized this natural proclivity and the need for institutional restraints on government action:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. . . . A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51 (James Madison).

Because governments no less than individuals are self-interested, the challenge faced by the Framers was "constructing and designing framework institutions [and] rules that will, to the maximum extent possible, limit the exercise of such interest in exploitative ways and direct such interest to furtherance of the general interest." Buchanan, "The Public Choice Perspective," in *Economia delle scelte pubbliche 1*, January 1983, 14; *see also* J. Buchanan & G. Tullock, *The Calculus of Consent* 24-5. The Due Process Clause of the Fifth Amendment is one of the several "auxiliary precautions" designed by the Framers to protect individuals from unwarranted government actions.

Constitutional restraints on the exercise of power are particularly needed when government agencies are granted authority to deprive individuals of private property. Today, agencies and bureaucracies operate independently from normal democratic control and accountability. *See* W. Niskanen, *Bureaucracy and Representative Government* (1971); C. Bolick, *Grassroots Tyranny: The Limits of Federalism* (1993). While many individuals within a government organization may share a principled commitment to carrying out the mission of the agency, government officials, operating in what they perceive as their own rational self-interest, will also attempt to maximize the size and budget of their agency. Larger budgets will

benefit everyone within an agency through higher salaries, greater job security, better equipment, and increased power and prestige.

The incentive to maximize an agency's budget through improper action is particularly strong in the context of civil forfeiture. Such incentives can affect even the most well-intentioned law enforcement officers. The present substance and application of civil forfeiture laws differ significantly from the laws scrutinized by this Court at the time of *Calero-Toledo*. In 1974, civil forfeiture was a rarely invoked power. In 1984, the United States Congress passed the Comprehensive Forfeiture Act, vastly expanding both the powers of government to seize and forfeit private property while also adding forfeiture provisions to numerous federal criminal statutes.[2]

Perhaps most significantly for due process analysis, Congress also established the Assets Forfeiture Fund, administered by the U.S. Department of Justice, and charged with collecting and distributing proceeds from successful forfeitures. 28 U.S.C. § 524(c)(1). Previously, all proceeds from forfeitures exceeding $5 million were transferred to the general fund of the Treasury. *See* Fried, *Rationalizing Criminal Forfeiture*, 79 J. Crim. L. & Criminology 328, 364 (1988). The 1984 amendments eliminated the ceiling and allowed unlimited proceeds to be placed in

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[2] *See, e.g.*, 16 U.S.C. §§ 65, 117d, 128, 171 (guns and other property used unlawfully in national parks); 18 U.S.C. § 1082 (property used in illegal gambling); 18 U.S.C. § 3667 (property used in liquor law violations); 21 U.S.C. § 881 (property, including real property, used in drug offenses).

the Fund for use by law enforcement agencies. 28 U.S.C. § 524(c)(4).

The 1984 amendments also revolutionized civil forfeiture by allowing federal Assets Forfeiture Fund proceeds to be shared with state and local law enforcement agencies. *See* 21 U.S.C. § 853(i)(4) (allowing payment of forfeiture proceeds to "any State or local . . . agency which participated directly in the seizure or forfeiture . . . "). After law enforcement agencies were granted a direct financial incentive to initiate and prosecute forfeiture actions, the use of the new statute and revenues generated by civil forfeiture skyrocketed. Proceeds from civil forfeiture increased from $27 million in 1985 to $644 million in 1991, *an increase of over 1500 percent*. *See* U.S. Dep't of Justice, *Federal Forfeiture of the Instruments and Proceeds of Crime: The Program in a Nutshell* 1 (1990). From 1984 to 1990, the U.S. government has forfeited property worth approximately $1.5 billion. *Foreword* to U.S. Dep't of Justice, *1990 Annual Report of the Department of Justice Asset Forfeiture Program*. The property and proceeds from forfeiture are retained and used for "law enforcement" purposes by the "seizing agencies." *See* 21 U.S.C. § 853(i)(4). This form of "revenue enhancement" for the federal government is independent of normal appropriation and budget processes. *See* 28 U.S.C. § 524(c)(1).

Of course, it is the prerogative of the federal government to increase the role of civil forfeiture in curtailing criminal activity. Nevertheless, courts have the corresponding obligation to ensure that these laws and their application do not violate constitutional guarantees.

When public officials and their agencies have a direct financial stake in the outcome of their actions, as in the case of civil forfeiture, this Court has subjected such actions to particularly close scrutiny. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (overturning fine where mayor, who also sat as a judge, personally received a share of the fines); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (due process violated where substantial portion of town's income came from fines imposed by town mayor sitting as judge). In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980), while upholding civil penalty provisions under the Fair Labor Standards Act, this Court declared that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." Such serious questions are raised, in part, when a government official's "judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts." *Id.* at 250.[3]

The potential for improper motives is especially great when state and local law enforcement agencies engage in "adoption." Federal officials can take over or "adopt" a forfeiture prosecution developed by local police and

[3] In reviewing the substance of legislation and government decision-making, this Court has held that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate when the State's self-interest is at stake." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977); *see also Harmelin v. Michigan*, 111 S.Ct. 2680, 2693 (1991) ("it makes sense to scrutinize government action more closely when the State stands to benefit").

prosecutors. Through adoption, state and local law enforcement can bypass state laws and procedures that may make it more difficult to seize property or to funnel forfeited proceeds to law enforcement agencies.[4]

Although it is not clear from the record, "adoption" seems to have taken place in the instant case. Hawaii authorities conducted the original search of the property and arrested and convicted respondent under state law. Brief for the United States at 2. Then, over four-and-a-half years later, the United States filed a forfeiture action against respondent's real property.[5]

[4] For example, many states require forfeiture proceeds to be placed in either general revenue accounts or devoted to drug rehabilitation programs. In contrast, federal forfeiture law "allocates up to ninety percent of the proceeds from drug-related forfeitures to be returned to local law enforcement agencies." Note, *Scorched Earth: How the Expansion of Civil Forfeiture Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911, 975 (1991); *see, e.g.*, 21 U.S.C. § 881(e)(1)(A).

Furthermore, many states place greater procedural limitations on the ability to seize and forfeit private property than federal statutes. For example, under Kentucky law, real property can be seized "only pursuant to final judgment and order of forfeiture or upon order of the court having jurisdiction over the property. . . . " Ky. Rev. Stat. § 218A.415. Ironically, the Attorney General of Kentucky filed an *amicus* brief in the instant case on behalf of 18 state attorneys general, advocating the summary seizure of real property without notice and a hearing if done by federal officials.

[5] The practice of reviewing old arrest records for forfeiture opportunities is seemingly common in the U.S. Attorney's Office in Hawaii. A recent news article recounts the attempted

The practice of adoption, in addition to normal sharing of forfeiture revenues with state and local law enforcement agencies, has prompted one federal appeals court judge to wonder whether "we are seeing fair and effective law enforcement or an insatiable appetite for a source for increased agency revenue." *United States v. $12,390.00*, 956 F.2d at 807.[6]

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forfeiture of the home of Joseph and Frances Lopes whose son was arrested and plead guilty to marijuana cultivation:

> Back when Thomas was arrested, police rarely took homes. But since then agencies have learned how to use the law and have seen the financial payoff, says Assistant U.S. Attorney Marshall Silverberg of Honolulu.
>
> They also carefully review old cases for overlooked forfeiture possibilities, he says. The detective who uncovered the Lopes case started a forfeiture action in February – just under the five year deadline for staking such a claim.

"Police profit by seizing homes of innocent," reprinted in *Presumed Guilty: The Law's Victims in the War on Drugs*, The Pittsburgh Press, August 11-16, 1991.

[6] In a recent *per curiam* decision, the Fifth Circuit scathingly indicted the practice of "adoption." The case arose out of the seizure of currency by a local sheriff's department in Louisiana. The money seized by local authorities was handed over to the federal Drug Enforcement Administration (DEA) for civil forfeiture the same day the state court ordered the currency seized and held for evidence as required under state law. In response to this bypass of state procedure, the appeals court declared that

> each member of the court was deeply disturbed by the actions of the federal and state agents in appropriating Scarabin's money – candidly acknowledged by counsel for DEA – actions that would have constituted illicit money laundering if perpetrated by private parties. We were even more distressed by the revelation that these activities were not merely condoned but were actively advocated and supported by officials of the DEA in positions to make and implement policy.

Scarabin v. Drug Enforcement Administration, 966 F.2d 989, 994 (5th Cir. 1992).

Coupled with agency enrichment in civil forfeiture proceedings, government officials often stand to personally benefit from seizures of property. A report by the General Accounting Office documented some of the personal uses to which forfeited assets have been put by law enforcement officials. *Internal Controls – Drug Enforcement Administration's Use of Forfeited Personal Property*, GAO (Dec. 10, 1986).[7] Although proceeds and assets gained through forfeiture are to be dedicated to the rather vague purpose of "law enforcement," the documented personal use of property by government officials smacks of the "direct, personal, substantial pecuniary interest" in the administration of justice this Court has not permitted. *Tumey v. Ohio*, 273 U.S. at 523.

Historically, some of the first restrictions placed on the power of government to forfeit private property stemmed from concern over individuals having a financial stake in the outcome of successful forfeitures. *See* L.

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[7] For example, the DEA's Special Agent-in-Charge in Dallas had adorned his office with "an elegant coffee and end table set, two walnut china cabinets filled with decorative plates and rare figurines, several oil paintings, a video cassette recorder and console television . . . , ornamental clocks, and other assorted bric-a-brac. . . . In congressional hearings during the spring of 1987, the DEA found its agents driving seized Mercedes, Cadillacs and other luxury cars." Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 Sw. L. J. 1111, 1128 (1988).

Schwoerer, *Declaration of Rights, 1689* 96. Article 12 of the English Declaration of Rights declared that "all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void." *See, e.g., Harmelin v. Michigan*, 111 S.Ct. 2680, 2686 (1991) (recognizing the English Declaration of Rights as the "antecedent of our constitutional text"). What the article aimed to eliminate was

> a practice that had grown up around the law of treason. The treason law provided that the property of a person convicted of treason was forfeited to the crown. The practice was for courtiers and others to solicit the forfeitures even before a judgment was rendered, thus creating a situation whereby they stood to benefit from a conviction. . . .

Schwoerer at 96. Although English estate forfeiture was abolished in this country by Article III, Section 3 of the Constitution (except for treason), the direct pecuniary benefit to law enforcement agencies who engage in forfeiture remains.

The entire current statutory scheme of federal civil forfeiture belies the notion that forfeitures are prosecuted by non-self-interested public officials. However, an analysis of the direct pecuniary benefits to government officials and agencies that engage in forfeiture is not an indictment of the integrity or character of the thousands of men and women at all levels of government who combat criminal activity on a daily basis; nor is it even an

indictment of the wisdom or feasibility of civil forfeiture in general.[8]

Rather, the purpose of examining the design of civil forfeiture law and the need for guaranteeing due process protections for property owners is to "differentiate between institutional arrangements that bring individual self-interest and the general welfare into harmony and institutional arrangements that leave them in conflict." *Public Choice and Constitutional Economics* 8 (J. Gwartney & R. Wagner, eds. 1988). The institutional arrangement and incentive structure behind civil forfeiture necessitates protection of the due process rights of property owners. Guaranteeing due process rights for property owners will help channel self-interest away from unjustified applications of forfeiture laws to boost agency revenue and toward genuine efforts to eliminate criminal activity.

II. THE REQUIREMENT OF NOTICE AND A HEARING FOR REAL PROPERTY OWNERS WILL PROTECT PRIVATE PROPERTY RIGHTS WITHOUT DAMAGING THE GOVERNMENT'S INTEREST IN STOPPING ILLEGAL ACTIVITY

The contemporary application of civil forfeiture has placed at loggerheads two fundamental assumptions of American law: "(1) that crime does not, or at least *should* not, pay, and (2) that property rights are a fundamental

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[8] *See* D. Farber and P. Frickey, *Law and Public Choice* 117 (1991) (emphasizing the enforcement of structural and procedural constraints on the exercise of government power over stricter scrutiny of the substance of legislation).

aspect of individual freedom." Pratt & Petersen, *Civil Forfeiture in the Second Circuit*, 65 St. John's L. Rev. 653, 655-56 (1991). Several commentators have noted that "[a]s civil forfeiture has been used with increasing aggressiveness, the discord between these two assumptions has increased to a point at which they seem unable to coexist." *Id.* at 656; *see also* Reed, *American Forfeiture Law: Property Owners Meet The Prosecutor*, Pol'y Analysis, Cato Inst., Sept. 29, 1992. Whatever the tension in other aspects of civil forfeiture, a requirement of notice and hearing in forfeiture of real property will preserve the importance of protecting private property owners from unjustified deprivation without damaging the government's substantial interest in curtailing criminal activity.[9]

A. *Rights to private property and the peaceful enjoyment of one's home are deeply rooted in our heritage and explicitly protected by the Constitution.* The right to acquire, own, and use property is of enormous constitutional significance. Indeed, this Court has recognized that "[t]he great end for which men entered into society was to secure their property." *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting Lord Camden, J. in *Entick v. Carrington and Three Other King's Messengers*, T. Howell, 19 Howell's State Trials 1029, 1066). The importance of private property in our tradition of law was aptly captured by Blackstone in the first pages of his *Commentaries*:

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[9] Although this section of the brief addresses the interests in private property and the contrasting governmental interests at stake under factors established by this Court in *Calero-Toledo*, the same reasoning would apply under the three-part due process analysis of *Matthews v. Eldridge*, 424 U.S. 319 (1976).

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

W. Blackstone, *Commentaries* 2 (1765).

One of the more important and revered rights of property ownership is the right to control and peacefully enjoy one's home. *See Payton v. New York*, 445 U.S. 573, 601 (1980) ("the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic"). As this Court declared in *Silverman v. United States*:

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty – worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

Id. at 365 U.S. 505, 511-12 n.4 (1961) (quoting *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting)). The sanctity of the home predates the founding of the United States. Early Anglo-Saxon law recognized the rights of homeowners above nearly all else: "[a] 'breach of the peace' in itself means nothing, for there is no general peace of the community, but only the thousands of islands of peace which surround the roof-tree of every householder, noble and simple. . . . " J.E.A. Jolliffe,

The Constitutional History of Medieval England 8 (1961); *see also* W. Blackstone, *Commentaries* 223 ("The law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity"). The government must meet a substantial burden to justify immediate seizure of such an important and cherished right.

B. *The governmental interests in immediate seizure of real property do not constitute an "extraordinary" situation justifying denial of notice and a hearing.* In contrast to the great constitutional importance of property in general and the home in particular, the governmental interests in immediate seizure and forfeiture of real property without notice or hearing are insubstantial. In *Calero-Toledo*, 416 U.S. at 679, immediate seizure of a yacht for forfeiture was upheld because the property seized was of the sort that could be "removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." The Ninth Circuit, in balancing the property owner's interest with that of the government, rightly noted the practical differences between the easily hidden or destroyed personal property of *Calero-Toledo* and the immobile real property of the instant case. As the court so crisply put it, "[t]he house is not going anywhere." *United States v. James Daniel Good Real Property*, 971 F.2d 1376, 1383-84 (9th Cir. 1992). These factual distinctions between personal and real property should also be considered by this Court in determining whether immediate seizure of real property is truly an "extraordinary" situation requiring departure from due process rights.

In arguing against requiring notice and a hearing to property owners, petitioner and its *amici* also point to the "possible danger to the seizing agents if the owner or occupant is tipped off in advance." Brief for the United States at 30; Brief for *Amici Curiae* States of Kentucky, *et al.*, in Support of Petitioner at 7-9. While it is possible that some property owners may face government agents with a "last stand" mentality even after notice and a hearing, the practical experience in seizures of real property leads to exactly the opposite conclusion: sudden and unannounced raids of homes by heavily armed police, often in the middle of the night, are much more likely to produce danger to both the agents and the homeowner.[10]

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[10] ABC News recently chronicled the unannounced seizure of a couple's home in California for alleged cultivation of marijuana. The wife of the slain homeowner told what happened:

> We were in bed, asleep, and the house started shaking, and the dogs were going crazy. I got up as fast as I could to get dressed. And I was going to the door. . . . At that point, the door burst open, and I just saw all these guns. And I didn't know who they were or what they were doing. I just screamed: "Don't shoot me. Don't kill me." . . . My husband heard me. And he came running into the living room. I heard him say, "Frances, are you all right?" He had his gun pointed above his head. . . . Someone yelled: "Put your gun down. Put your gun down. Put your gun down." Bang. My husband fell right down in front of me.

"Death of Donald Scott," *Transcript of ABC News' 20/20*, (April 2, 1993).

Not only would notice and a hearing have prevented the taking of a life in this case, the hearing also would have demonstrated the innocence of the homeowners – no marijuana was ever found on the property.

Amici for petitioner also raise the specter of "crackhouses" in claiming that a requirement of notice and hearing would frustrate the government's efforts to seize and forfeit "real property associated with the illicit drug industry." Brief of *Amici Curiae* at 8. When raising the possibility of danger to agents and the threat of thriving crackhouses, petitioner and its *amici* ignore an important caveat of the appeals court's holding. The Ninth Circuit held that the Due Process Clause requires notice and hearing to real property owners before seizure *unless an emergency situation exists. James Daniel Good Real Property*, 971 F.2d at 1384. While not creating an automatic exception to due process requirements as urged by the government, the appeals court's holding allows for immediate seizure of real property when the public's or law enforcement officers' safety is at particular risk.

C. *Fourth Amendment guarantees and Justice Department internal policy positions are inadequate protections against unjustified and mistaken deprivations of property.* The government claims that the only constitutional protection for the property rights of the homeowner in the instant case lies in the Fourth Amendment's protection against unreasonable searches and seizures. Brief for the United States at 24-35. The government opposes the application of the Fifth Amendment to civil forfeiture cases because most due process requirements apply to "civil cases outside the context of law enforcement and forfeiture." Brief for the United States at 24. This same term, however, the government argued that forfeiture was primarily a civil proceeding and should not be analyzed under constitutional requirements involving criminal law. *See* Brief for the United States, *Austin v. United States*, No. 92-6073

(arguing that the Eighth Amendment's prohibition on cruel and unusual punishments should not apply to civil forfeiture). Apparently, from the perspective of the government, the question of whether forfeiture is a civil or criminal proceeding turns on which provision of the Constitution the government wishes to evade.

By concentrating exclusively on the protections afforded property owners under the Fourth Amendment, the government overlooks other constitutional protections for property rights, most notably the Fifth Amendment's protection against deprivations of property without due process of law. Moreover, petitioner ignores the different underlying purposes of specific protections in the Bill of Rights. While the purpose of the Fourth Amendment is to guard against unreasonable searches and seizures, the "two central concerns of procedural due process [are] the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process." *Marshall*, 446 U.S. at 242.

The risk of unjustified deprivations and the great need for participation of interested parties is particularly strong in the context of real property forfeiture. Reports of "unjustified and mistaken" deprivations of property due to civil forfeiture abound.[11] One of the main reasons for unjustified and mistaken forfeitures of homes and other real property – and why constitutional protection

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[11] For a particularly gripping and well-documented account of wrongful and mistaken deprivat ons of property due to civil forfeiture, *see Presumed Guilty: The Law's Victims in the War on Drugs*, The Pittsburgh Press, August 11-16, 1991.

cannot be limited to Fourth Amendment guarantees – is the clash between the ancient concept of civil forfeiture and the modern nature of real property rights. Civil forfeiture is premised on the legal fiction that the property itself is "guilty" of illegal activity. Problems arise in real property forfeiture, however, because "[s]everal parties can simultaneously hold an interest in a single piece of real property. When the illegal action of one interest holder subjects a parcel of real property to forfeiture, the rights of the remaining interest holders are jeopardized." Note, *Civil Forfeiture of Real Property*, 10 Pace L. Rev. 485, 486 (1990); *see also* Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. Rev. 217 (1992).

Some of the owners of varied interests in a single parcel of land today include fee owners, mortgagees and creditors with security interests in the property, tenants with leasehold interests, and the holders of future interests. Most of these interests eventually would qualify as "innocent owners" under civil forfeiture statutes. *See* 21 U.S.C § 881(a)(6). Even "innocent ownership" claims, however, require "judicial validation." *See* Note, 72 B.U. L. Rev. at 219. Such "validation" under current precedent may take several months, if not more than a year. *See United States v. $8,850*, 461 U.S. 555 (1983) (no due process violation for filing of forfeiture action eighteen months after seizure). Seizure of real property without notice or an opportunity to be heard seriously compromises these interests while the forfeiture action and claims of innocent ownership slowly proceed in the courts. Pre-seizure

notice and a hearing to those with interests in real property would minimize unjustified or mistaken injuries to those interests and allow parties to take steps to protect their rights in the property.

Requiring notice and hearing to those with interests in real property will also fulfill the second concern of procedural due process, "the promotion of participation and dialogue between affected individuals in the decision-making process." *Marshall*, 446 U.S. at 242. Notice and an opportunity for a hearing would allow participation by these parties in determining whether seizure of real property is necessary or whether less intrusive methods of securing the government's interest (and their own) are available, such as the filing of a *lis pendens*, restraining order, or the posting of a bond.[12] Petitioner's argument would allow for the summary seizure of real property, under any circumstances, without notice or an opportunity to be heard for any of the interested parties who may find their rights suddenly compromised and difficult to regain.

In addressing the rights of property owners when confronted with seizure and forfeiture of real property,

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[12] One appeals court has admonished district courts to take such measures:

> The district courts, in order to preserve some modicum of due process to . . . civil forfeiture claimants should be vigilant in approving seizures *ex parte* only upon a showing of the most extraordinary or exigent of circumstances, and whenever possible should favor less drastic measures.

United States v. All Assets of Statewide Autoparts, Inc., 971 F.2d 896, 905 (2d Cir. 1992).

the government points to Justice Department policy as providing adequate protection to those with interests in real property. Brief for the United States at 12-14. According to Justice Department guidelines, "occupants of real property seized for forfeiture are permitted to remain in the property pursuant to an occupancy agreement pending forfeiture," if a number of conditions are met. Directive No. 90-10 (1990) at 2. Petitioner also points to the facts of the instant case whereby tenants were allowed to remain on the property pending forfeiture.

Apart from the failure of Justice Department policy to protect property interests beyond those of occupants, this Court should reject the argument that the policy positions of a prosecutorial government agency are an adequate safeguard for the constitutional rights of owners of property interests. The United States pursued a similar argument from policy in a recent forfeiture case before this Court. *United States v. A Parcel of Land, Bldgs., Appurtances, and Improvements Known as 92 Buena Vista Ave., et al.*, 113 S.Ct. 1126 (1993). In arguing that title to property vests irreversibly in the government from the time property is used in illegal activity, the government pointed to Justice Department policy that would mitigate any harm this position would cause "innocent owners." Such assurances were considered by this Court inadequate to protect the statutory rights of innocent owners.[13]

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[13] In responding to the government's assurances during oral argument, this Court stated: "I know you're very generous and wouldn't do it, but we're talking law, not policy." Transcript of Oral Argument in *A Parcel of Land* . . . (Oct. 13, 1992). Despite the generosity of the government in not summarily removing tenants in the instant case, their decision was merely one of administrative grace.

Likewise, Justice Department policy should not be afforded substantial weight in the instant case. Policy positions are not a substitute for the safeguarding of constitutionally protected property rights.

The requirement of notice and an opportunity to be heard before deprivations of property is a cornerstone of our civil liberties. Though usually a minor hurdle for responsible law enforcement officials, it nonetheless creates a mighty bulwark against the overzealous use of government's powers. Nowhere are the financial incentives to abuse these powers greater than in the civil forfeiture area – hence, nowhere is the need greater to safeguard against such abuses.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court affirm the opinion below.

Respectfully submitted,

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